# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. J. MACHELLE SWEETING** **PART** **62**

***Justice***

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OUSMAN SAVANE,

Plaintiff,

- v -

THE CITY OF NEW YORK, DET. NELA GOMEZ (TAX ID NO. 938585), SGT. ANGEL LEON (TAX ID NO. 917866), SGT. GREGORY ACCOMANDO (TAX ID NO. 923481), SGT. TYNETTA JACKSON (TAX ID NO. 920423), SGT. LUKE SULLIVAN,

Defendant.

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**INDEX NO.** 153348/2015

**MOTION DATE** 01/30/2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 118

were read on this motion to/for DISMISSAL.

In this lawsuit, plaintiff Ousman Savane alleges that on October 4, 2012, the City of New York ("the City"), through the actions of defendant police sergeants and police detective (the "police officers") (hereinafter referred collectively with the City as "defendants"), arrested him and accused him of sexually assaulting a minor. Plaintiff contends that the arrest was unlawful and that he was arrested without a warrant, and that the police officers acted in bad faith. He also states that he was "assaulted and battered" while in custody (NYSCEF Doc. No. 89 [Complaint], ¶¶ 54-55). He was incarcerated at Riker's Island from October 4, 2012, and he was charged and prosecuted. After around 15 months in custody, on January 13, 2014, "all charges against him were dismissed and he was released from custody" (*id.*, ¶ 44). The dismissal occurred after the assistant district attorney determined that the complaining witness's report was not credible.

Shortly after his release, plaintiff filed a notice of claim with the City's comptroller and on April 6, 2015, he filed a summons and complaint. The complaint sets forth 17 causes of action against defendants as well as against District Attorney Cyrus Vance, and Assistant District Attorney Nahal Batmanghelikj (the "DA defendants"). The causes of action are: 1) false arrest against all defendants, 2) assault and battery against defendant police officers, 3) malicious prosecution against all defendants, 4) intentional infliction of emotional distress against all individual defendants, 5) negligence against all defendants, 6) negligent hiring, training, and supervision against the City, 7) 42 USC § 1983 against all defendants based on the first three causes of action, 8) 42 USC § 1983 against the DA defendants, 9) 42 USC § 1983 alleging conspiracy against all defendants, 10) 42 USC § 1983 alleging a violation of *Brady v Maryland* (373 US 83 [1963]) against all individual defendants, 11) 42 USC § 1983 alleging unreasonable length of detention against all defendants, 12) 42 USC § 1983 against all defendants, alleging failure to intervene to prevent the mistreatment of plaintiff, 13) 42 USC § 1983 alleging procedural and substantive due process violations against all defendants, 14) 42 USC § 1983 alleging unreasonable decision to continue the prosecution of plaintiff, against all defendants, 15) 42 USC § 1983, against the City, 16) Article I, § 12 of the State constitution against the individual defendants, and 17) 42 USC § 1988 against all defendants.

The DA defendants moved to dismiss the entire action as against them. On November 6, 2015, the court (Judge Kotler) granted the motion in part (Motion Sequence #001) (NYSCEF Doc. No. 30). The court (Judge Kotler) also denied the DA defendants' motion to reargue (Motion Sequence #002) (NYSCEF Doc. No. 62). In an order dated March 23, 2017, the First Department reversed the trial court's order to the extent that it failed to dismiss all causes of action against the

DA defendants (*Savane v District Attorney of New York County*, 148 AD3d 591 [1st Dept 2017], NYSCEF Doc. No. 72).

In the current motion, (Motion Sequence #003), defendants seek dismissal, pursuant to CPLR § 3211 (a)(7) of the second, fourth, fifth, sixth, fifteenth, and sixteenth causes of action as against all remaining defendants. They also seek to dismiss the seventh, ninth, eleventh, twelfth, thirteenth, fourteenth, and seventeenth causes of action as against the City. In opposition, plaintiff concedes that the second, fourth, fifth, sixth, and sixteenth causes of action should be dismissed, and plaintiff also concedes that the seventh, ninth, eleventh, twelfth, thirteenth, and fourteenth causes of action should be dismissed as against the City. However, plaintiff opposes that branch of defendants' motion that seeks dismissal of the fifteenth cause of action alleging violations of 42 USC § 1983 against the City and the seventeenth cause of action, providing for attorneys' fees pursuant to 42 USC § 1988, as against the City.

Applicable Standards under CPLR § 3211 (a)(7)

When a court considers a motion to dismiss under CPLR § 3211 (a)(7), it "is required to accept as true the facts as alleged in the complaint, accord the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009]; *see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021]). The court does not decide "[w]hether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims" (*Mirro v City of New York*, 159 AD3d 964, 966 [2d Dept 2018] [internal quotation marks and

citation omitted]; *see CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556, 556 [1st Dept 2021]).

Plaintiff's fifteenth cause of action, which is a 42 USC § 1983 claim, arises under *Monell v Department of Social Servs. of City of New York* (436 US 658 [1978]). In *Monell*, the United States Supreme Court ruled

> that a local government may not be sued under § 1983 for an injury solely inflicted by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983" (*Monell*, 436 US at 694).

To survive a motion to dismiss a *Monell* claim, the plaintiff must plead that: (1) an official policy or custom exists as a result of which (2) the plaintiff is subjected to (3) the denial of a constitutional right (*Pilcher v City of New York*, 68 Misc 3d 1211 [A], 2020 NY Slip Op 50913 [U], *1 [Sup Ct, Bronx County 2020]). Broad, conclusory allegations of an unconstitutional policy are not sufficient (*Fludd v City of New York*, 199 AD3d 894, 897 [2d Dept 2021] [under CPLR § 3211 [a] [7]). Instead, the complaint must have "facial plausibility," which exists only when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (*Ashcroft v Iqbal*, 556 US 662, 678 [2009]). More specifically, the plaintiff must allege that an official policy or custom of the government caused the employees to violate her or his constitutional rights (*Hetelekides v County of Ontario*, 39 NY3d 222, 240 [2023] [dismissing cause of action after bench trial]). That is, the actions must result from the policy or custom (*see Chavez v City of New* York, 33 Misc 3d 1214 [A], 2011 NY Slip Op 51930 [U], *2-3 [Sup Ct, NY County 2011], *affd* 99 AD3d 614 [1st Dept 2012]). In addition, the practices must be "so persistent and widespread as to practically have the force of law" (*De Lourdes Torres v Jones*, 26 NY3d 742, 768 [2016] [internal quotation marks and citation omitted]

[summary judgment]). Thus, a single unconstitutional incident generally is insufficient to support a claim (*Fischetti v City of New York*, 61 Misc 3d 1224 [A], 2018 NY Slip Op 51737 [U], *3 [Sup Ct, Queens County 2018] [summary judgment]).

Discussion

According to plaintiff's fifteenth cause of action, the police officer defendants engaged in their alleged misconduct "pursuant to policies and practices of the City of New York which were in existence at the time of the conduct . . . and were engaged in with the full knowledge, consent, and cooperation and under the supervisory authority of the defendant CITY and its agency, the NYPD . . . " (NYSCEF Doc. No. 89, ¶ 238). Further, the cause of action alleges that these policies and practices proximately caused plaintiff's injuries. More specifically, the complaint asserts that, among other things, the City's police department had policies and practices of ignoring the civil rights of its citizens, of ignoring police misconduct, of failing to supervise and train its officers as to the limits of their authority, leading to "a pattern of deliberate indifference" to constitutional rights (*id.*, ¶ 243), and of allowing citizens to be "wrongfully accused of committing crimes that the police . . . knew they had not committed" (*id.*, ¶ 250), and of failing to discipline officers who did not conduct proper investigations, preserve evidence, or respect citizens' constitutional rights (*see id.*, ¶ 258). In addition, the complaint states that the police department fails "to . . . control police officers engaged in the excessive use of force, in warrantless and otherwise unconstitutional and impermissible arrests and imprisonments, particularly those who are repeatedly accused of such acts; and [that it endorses] the police code of silence wherein police officers regularly cover up police abuse of power by telling false and incomplete stories" (*id.*, ¶ 264). The complaint alleges that the City did not establish a proper system for dealing with claims of police misconduct,

that it allowed officers to lie under oath, and that it accepted and even encouraged the actions of police officers who cover up the misconduct of other officers (*see id.*, ¶ 258).

In support, plaintiff points to The Report of the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, dated July 7, 1994 ("the Mollen Report"). The Mollen Report determined that there was "'an institutional reluctance to uncover corruption'" which "'manifested itself in every component of the Department's corruption controls from command accountability and supervision, to investigations, police culture, training and recruitment'" (NYSCEF Doc. No. 89, ¶ 262 [a] [quoting the Mollen Report, at *2-3]). The complaint also points to the Mollen Report's conclusion that perjury by officers and the falsification of records were the most common forms of corruption. It further states that even honest police officers tolerated these falsifications, as necessary in order to arrest suspected criminals.

In addition, the complaint cites a 1987 report by the Mayor's Advisory Committee on Police Management and Personnel Policy for the proposition that officer training was inadequate. Next, the complaint asserts that an unpublished report by the City Comptroller determined that "the police often conduct inadequate investigations" (NYSCEF Doc. No. 89, ¶ 262 [d]). It cites Civilian Complaint Review Board ("CCRB") statistics from the 1980s to the early 1990s, which found that not all complaints were investigated, and the CCRB only substantiated a small percentage of the complaints. According to the complaint, the City regularly settles claims against officers or lost civil jury verdicts alleging officer misconduct where there has been no disciplinary action. Finally, the complaint includes quotes from prior police commissioners about the "code

of silence" and the "blue wall of solidarity with . . . its cover-ups and silence" (*id.*, ¶¶ 262 [v], [w]).[1]

In support of their motion to dismiss the fifteenth cause of action, defendants argue that plaintiff's *Monell* cause of action is not plausible. According to defendants, the language in the complaint is too general in that it merely alleges de facto policies and "a bevy of" alleged failures relating to the training of police officers (NYSCEF Doc. No. 87, ¶ 40). Defendants state that plaintiff does not include any facts to support these generalized accusations.

Further, defendants contend that plaintiff's references to the Mollen Report, along with other reports and quotes by past police commissioners about the department, are "scattershot references to historical findings [that] are disconnected from this case" (*id.*, ¶ 41). More specifically, defendants point out that plaintiff does not specify the nature of the police misconduct that the CCRB investigated or the basis of the civil actions. They cite numerous cases, including *Cozzani v County of Suffolk* (84 AD3d 1147, 1147 [2d Dept 2011] [under CPLR § 3211 [a] [7]), *Pang Hung Leung v City of New York* (216 AD2d 10, 11 [1st Dept 1995] [summary judgment]), and *Perciaccanto v City of New York* (47 Misc 3d 1216 [A], 2015 NY Slip Op 50647 [U], *13 [Sup Ct, Bronx County 2015]), for the proposition that "broad and conclusory statements, coupled with [the] failure to allege facts of the alleged offending conduct, are insufficient to state a claim under § 1983" (*Leung*, 216 AD2d at 11). Defendants evaluate the claim largely under the pleading standard applicable to 42 USC § 1983, but they allege that the claim also fails under the stricter State pleading standards.

[1] Plaintiff did not provide copies of or links to the cited materials.

In opposition, plaintiff initially argues that defendants wrongly apply the 42 USC § 1983 pleading standard. In addition, he contends that, contrary to defendants' position, the State standard does not require more specificity. He points out that, even after the United State Supreme Court's decision in *Iqbal*, courts apply CPLR § 3211 (a)(7) (citing, *e.g., Vargas v City of New York*, 105 AD3d 834, 836-837 [2d Dept 2013]). He points out that *Rizvi v North Shore Hematology-Oncology Assoc., P.C.* (69 Misc 3d 1212 [A], 2020 NY Slip Op 51281 [U] [Sup Ct, Suffolk County 2020]) discusses the split between the Federal and State pleading standards (*see also Artis v Random House, Inc.*, 34 Misc 3d 858, 864 [Sup Ct, NY County 2011] [stating that the decision in *Vig* (67 AD3d at 145) "represents the First Department's determination to adhere to notice pleading standards under New York law regardless of *Iqbal's* implications for notice pleading under federal law"]). For this reason, the notice pleading requirement set forth in the CPLR applies. Plaintiff stresses, too, that the court should not penalize him even if it determines that he has filed a poorly drawn complaint (citing *Foley v D'Agostino*, 21 AD2d 60, 65 n 1 [1964]).

According to plaintiff, the fifteenth cause of action satisfies New York's liberal pleading requirements because it alleges that an official policy or custom caused him to suffer from a denial of his constitutional rights. Here, he argues, he has alleged that the City's failure to supervise and train police officers properly, and the practice of ignoring evidence of police misconduct, led to his injuries. He quotes the complaint at length, arguing that the quoted statements are sufficiently specific. He suggests that his references to the Mollen report and other studies and statistics are proper because they support his claim that there is a long-standing history of misconduct by the City (citing *Gentile v County of Suffolk*, 926 F2d 142, 152-153 [2d Cir 1991] [evaluating judge's exclusion of evidence at trial]). Further, he states, the complaint gives adequate notice to

defendants of the elements of his cause of action (citing, *e.g.*, *Elie v City of New York*, 92 AD3d 716, 717-718 [2d Dept 2012]).

Plaintiff points to *Blake v City of New York* (148 AD3d 1101 [2d Dept 2017]) in support of his position that his *Monell* claim should survive defendants' CPLR § 3211 motion. The complaint in *Blake* also arose from the dismissal of charges against the plaintiff after months of incarceration (NYSCEF Doc. No. 99). The *Monell* claim in that case asserted that the defendant police officers acted pursuant to the policies of the local police department (*id.*, ¶¶ 226-247). The complaint alleged that the City did not properly and effectively train police officers, that they rarely recommended disciplinary action in response to complaints against police officers, that they did not have adequate stress management training in place, and that as a matter of policy they permitted officers such as the defendants "to falsely . . . arrest, imprison, assault and batter and/or excessively restrain" individuals such as the plaintiff (*id.*, ¶ 240). The Second Department affirmed that part of the trial court's order that had denied the defendants' motion to dismiss the *Monell* cause of action. The court found that, "despite the defendants' contentions to the contrary, the allegations in the complaints sufficiently allege that the City maintained a policy or custom that caused the plaintiffs to be subjected to a denial of their constitutional rights" (*Blake*, 148 AD3d at 1104).

Plaintiff also annexes a copy of the complaint in *Elie v City of New York* (NYSCEF Doc. No. 100). *Elie* also involves the alleged false and malicious arrest and detainment of the plaintiff. As is relevant here, the complaint asserted that "the Defendants established a custom policy and/or practice of encouraging, approving and/or tolerating the use by the New York City Police Department ("NYPD") of excessive force and acts of misconduct against civilians, . . . and subsequent attempts to conceal such actions by failing to adequately train, supervise, and discipline its agents, employees and offices" (*id.*, ¶ 63). The Second Department concluded that the

allegations "sufficiently allege that the City of New York maintained a policy or custom that caused the plaintiff . . . to be subjected to a denial of a constitutional right" (*Elie*, 92 AD3d at 717-718). Thus, it affirmed that part of the trial court's decision that denied the defendants' motion to dismiss the cause of action under CPLR § 3211 (a) 7).

Although the claims here are not identical to those in *Blake* and *Elie*, the complaint contains similar allegations. Like the complaint in *Blake*, the complaint here cites the Mollen report in support (*see, e.g.*, NYSCEF Doc. No. 89, ¶¶ 258 [h], [l], 261-262, 265, 266). The cause of action before the court also refers to "the police code of silence wherein police officers regularly cover up police abuse of power by telling false and incomplete stories" (*id.*, ¶ 232) and suggests that the officers coerced witnesses to give false and damaging testimony. Plaintiff argues that this court should reach a similar conclusion and sustain the *Monell* cause of action.[2]

In reply, defendants argue that New York's pleading requirements are not substantially different from the federal requirements. Specifically, they argue, the complaint must link the allegations of wrongdoing to the alleged policies or practices at issue. Defendants again cite *Cozzani*, *Leung*, and *Perciaccanto*. In addition, they note that in *Bryant v City of New York* (188 AD2d 445, 446 [2d Dept 1992]), the Second Department dismissed a *Monell* cause of action due to "the complete absence of any factual allegations in the complaint regarding the alleged 'policies' of the municipal defendants which led to the officers' conduct, or evidencing their approval or 'ratification' of this conduct." They contend that here, too, there is an absence of factual allegations regarding the challenged police department practices.

[2] Although plaintiff seeks leave to amend the complaint, if there are any deficiencies, such "affirmative relief must be requested by the appropriate Notice of Motion, Order to Show Cause or Cross-Motion and cannot be made in opposition papers alone" (*Crocker C. v Anne R.*, 53 Misc 3d 1202 [A], 2016 NY Slip Op 51330 [U], *16 [Sup Ct, Kings County 2016]; *see New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609 [2d Dept 2007]).

In addition, defendants distinguish other cases upon which plaintiff relies in support of their arguments that plaintiff's burden is not enhanced, but merely reflective of the elements of a *Monell* claim, and that even under the CPLR, plaintiff must allege factual elements sufficient to show a custom or practice (*see* NYSCEF Doc. No. 118, ¶ 11 [citing *Vargas,* 105 AD3d at 834]). Defendants also rely on *Thompson v City of New York* (50 Misc 3d 1037 [Sup Ct, Bronx County 2015]), which considered a motion to dismiss for failure to state a cause of action. In that case, the Supreme Court, Bronx County dismissed a *Monell* claim because the plaintiff did not "plead the specific facts establishing that his arrest, assault, imprisonment, and prosecution was the result of a municipal custom or practice" (*id.* at 1056). Further, defendants state that plaintiff relies on cases that are not helpful, because of the dearth of facts in the cited decisions.

After careful consideration, this court denies that prong of defendants' motion that seeks dismissal of the fifteenth cause of action. Taking the relevant elements of the complaint, plaintiff asserts that officers in the police department arrested him although they knew that the complainant was untrustworthy and he was not guilty. He also indicates that the police officers lied about his guilt in order to detain him and to give the DA a reason to prosecute him.[3] Finally, in support of his *Monell* claim, plaintiff cites various documents such as the Mollen report that accuses the police department of a pattern and practice of allowing police officers to falsify materials and commit perjury, and of protecting those police officers who engage in these practices. Giving the complaint a liberal construction and accepting its allegations as true (*see Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]), and viewing the complaint as alleging "whatever may be implied from its statements by reasonable intention" (*Natixis Real Estate Capital Trust 2007-*

[3] Plaintiff further suggests that he was assaulted, though it is unclear whether he views the detainment and fingerprinting as an assault or whether he alleges additional brutality.

*HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 135 [1st Dept 2017]), this court finds that the complaint adequately states a *Monell* claim.

Moreover, defendants' challenges to the cause of action lack merit. As plaintiff notes, reliance on the Mollen report has been deemed sufficient to support *Monell* causes of action if they are related to the alleged injuries (*e.g.*, *Blake*, 148 AD3d at 1104; *Elie*, 92 AD3d at 717-718). Further, the Mollen report details a practice of perjury and the falsification of records in order to support arrests, a failure to train police officers properly so as to avoid these problems, and a code of silence about these practices. Contrary to defendants' position, these practices all correspond to plaintiff's allegation that the police violated plaintiff's constitutional rights. Defendants also challenge plaintiff's reliance on the Mollen report and other materials from the 1980's and 1990's because so much time has passed since their issuance. However, these challenges relate to the weight and credibility of the evidence, and those factors are not relevant in a CPLR § 3211 (a)(7) motion. "Whether the plaintiff will ultimately be successful in establishing [his] allegations is not part of the calculus" (*Landon*, 22 NY3d at 6).

This court also denies that prong of defendants' motion that seeks to dismiss the seventeenth cause of action as against the City. This cause of action seeks attorney's fees under 42 USC § 1988. As is relevant here, 42 USC § 1988 provides that if a plaintiff prevails in a 42 USC § 1983 action, "the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee as part of the costs" (42 USC § 1988 [b]). Although defendants do not present arguments in support of this prong of their motion, implicit is their position that, as they seek dismissal of all claims against the City, 42 USC § 1988 no longer applies. However, as stated above, this court denies the request to dismiss plaintiff's *Monell* cause of action against the City.

Accordingly, the seventeenth cause of action is viable. This court does not, however, opine on whether reasonable attorney's fees should be awarded if plaintiff prevails.

Conclusion

It is hereby

**ORDERED** that defendants' motion is granted to the extent that the second, fourth, fifth, sixth, and sixteenth causes of action are dismissed; and it is further

**ORDERED** that defendants' motion is granted to the extent that the seventh, ninth, eleventh, twelfth, thirteenth, and fourteenth causes of action against the City are dismissed; and it is further

**ORDERED** that defendants' motion is denied to the extent that it seeks dismissal of the fifteenth and seventeenth causes of action as against the City.

**5/17/2023**
**DATE**

**J. MACHELLE SWEETING, J.S.C.**

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| **CHECK ONE:** | [ ] | **CASE DISPOSED** | | [X] | **NON-FINAL DISPOSITION** | | |
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| **APPLICATION:** | [ ] | **SETTLE ORDER** | | [ ] | **SUBMIT ORDER** | | |
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